Supreme Court, U. S.
FILED
NOV 25 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

Nos. 77-25, 77-37 and 77-42

FLAGG BROTHERS, INC., et al.; LOUIS J. LEFKOWITZ, Attorney General of the State of New York; and AMERICAN WAREHOUSEMEN'S ASSOCIATION and THE INTERNATIONAL ASSOCIATION OF REFRIGERATED WAREHOUSES, INC.,

Petitioners,

vs.

SHIRLEY HERRIOTT BROOKS, et al.,

Respondents.

BRIEF OF RESPONDENTS IN SUPPORT OF PETITIONERS, WAREHOUSEMEN'S ASSOCIATION OF NEW YORK AND NEW JERSEY, INC. AND THE COLD STORAGE WAREHOUSEMEN'S ASSOCIATION OF THE PORT OF NEW YORK

ARNOLD H. SHAW
Attorneys for Warehousemen's Association of New York and New Jersey, Inc. and The Cold Storage Warehousemen's Association of the Port of New York

JAFFE, SHAW & ROSENBERG
51 Madison Avenue
New York, New York 10010
(212) 683-0275

Of Counsel

TABLE OF CONTENTS

	Page
Opinion Below	2
Statement of Jurisdiction	2
Provisions of the U.S. Constitution and Statutes Involved	3
The Question Presented.	4
Statement	4
The Argument.	6
Neither the Warehousemen's Lien (§7-209, N.Y. Uniform Commercial Code) Nor Its Enforcement (§7-210, Supra) Constitutes State Action. . .	6
The Procedural Section of the Uniform Commercial Code, 7-210 (2) Authorizing Enforcement of the Warehousemen's Lien by Sale is a Reaffirmation of an Ancient Statutory Right. As Such, This Section Should be Afforded the Same Weight and Treated and Regarded in the Same Light as a Right Founded Upon Orthodox Common Law Antecedents	9

Page

The Issue at Bar Relates to the Enforceability of the Possessory Lien Based Purely Upon Statutory Authorization Therefor. The Issue Has No Relevance to Enforcements by Sale Pursuant to Contracts 10

Conclusion 11

TABLE OF AUTHORITIES

Cases.

Bond v. Dentzer, 494 Fed. 2nd 302, cert. den. 418 U.S. 837. . 8, 10

Brooks v. Flagg, 553 Fed. 2nd 764 . . . . . 2, 5

Burton v. Wilmington Parking Authority, 365 U.S. 715 6

Jackson v. Metropolitan Edison, 419 U.S. 345, 351 6

Jackson v. Statler, 496 Fed. 2nd 623, cert. den. 420 U.S. 927. . 6

James v. Pinnex, 495 Fed. 2nd 206 8

Moose Lodge v. Irvis, 407 U.S. 163 6

Reitman v. Mulkey, 387 U.S. 369 . 6

Shirley v. State National Bank, 493 Fed. 2nd 739, cert. den. 419 U.S. 1009 . . . . . .8, 9 ,10

The U.S. Constitution.

Fourteenth Amendment. 3

Statutes.

28 U.S.C. §1343 . . . . . 3, 5

42 U.S.C. §1983 . . . . . 3, 4, 5

Uniform Commercial Code
§7-209 & §7-210 . . . . . 4, 8, 9

118 General Business Law of
New York. 8

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977.

Nos. 77-25, 77-37 and 77-42

FLAGG BROTHERS, INC., et al.; LOUIS J. LEFKOWITZ, Attorney General of the State of New York; and AMERICAN WAREHOUSEMEN'S ASSOCIATION and THE INTERNATIONAL ASSOCIATION OF REFRIGERATED WAREHOUSES, INC.,

Petitioners,

vs.

SHIRLEY HERRIOTT BROOKS, et al.,

Respondents.

BRIEF OF RESPONDENTS IN SUPPORT OF PETITIONERS, WAREHOUSEMEN'S ASSOCIATION OF NEW YORK AND NEW JERSEY, INC. AND THE COLD STORAGE WAREHOUSEMEN'S ASSOCIATION OF THE PORT OF NEW YORK

OPINIONS BELOW.

The decision of the United States Court of Appeals for the Second Circuit has been reported in 553 Fed. 2nd 764.

The decision of the United States District Court for the Southern District of New York has been reported in 404 Fed. Supp. 1059, and the decision permitting the several defendants-intervenors to intervene has been reported at 63 FRD 409. [The defendants-intervenors are: (a) the Attorney General of New York; (b) The American Warehousemen's Association; (c) The International Association of Refrigerated Warehouses, Inc.; (d) the Warehousemen's Association of New York and New Jersey, Inc. - name changed from Warehousemen's Association of the Port of New York, Inc. 553 Fed. 2nd at p. 768, n. 8; and (3) The Cold Storage Warehousemen's Association of the Port of New York.] The defendants-intervenors mentioned in (a), (b) and (c) are petitioners herein, and those mentioned in (d) and (e) are respondents herein in support of the petitioners.

STATEMENT OF JURISDICTION.

This case comes to the Supreme Court by virtue of a granting on October 3, 1977 of writs of certiorari to the United States Court of Appeals for the Second Circuit (n.o.r.).

PROVISIONS OF THE UNITED STATES CONSTITUTION AND STATUTES INVOLVED.

(1) Fourteenth Amendment to the United States Constitution (to the extent here pertinent): "***no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

(2) 28 U.S.C. §1343 (5): "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(3) to redress the deprivation under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States."

(3) 42 U.S.C. §1983: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the depriva-

tion of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in-equity, or other proper proceeding for redress."

(4) The Uniform Commercial Code, (62-1/2 McKinney's Consol. Laws of N.Y.) §7-209 and §7-210 (A. 161a-164a).

THE QUESTION PRESENTED.

Does a warehouseman's exercise of non-judicial sale to enforce his lien in a manner specified by the Uniform Commercial Code §7-210, Subdivision 2, constitute action "under color of State law" within the meaning of 42 U.S.C. §1983 or State action under the Four-teenth Amendment?

STATEMENT.

By the original action, the plain-tiffs-respondents, Brooks and Jones, challenge the constitutionality of Uniform Commercial Code §7-209 and §7-210 pursuant to 42 U.S.C. §1983. The challenge was based upon the con-tention that a threatened lien enforce-ment proceeding respecting plaintiffs' household furnishings stored in the public warehouse of defendant-respondent, Flagg Bros., Inc. constitutes State action because the statute authorizing the enforcement, U.C.C. §7-210 (2) dele-gates to the warehouseman uniquely

governmental powers and expands the remedies available to the warehouseman beyond those which he possessed at common law (Brooks v. Flagg, 553 Fed. 2nd at p. 769; A. 15a, 16a). The District Court dismissed the action holding that "***plaintiffs have failed to show suf-ficient State involvement in the enforce-ment of warehousemen's liens to confer jurisdiction upon a Federal District Court under 28 U.S.C. §1343 (3), or to state a claim under 42 U.S.C. §1983." (A. 141a-152a.) By a divided Court, the Court of Appeals for the Second Circuit reversed the District Court's dismissal of the complaint. The majority found that the sale provisions were statutory in nature and were in the nature of a public function sufficient to conclude that "State action" was involved. The dissenting Judge, in effect, affirmed the District Court's opinion that at no time has the enforce-ment of a warehouseman's lien been con-sidered a public function involving the State to a significant degree. The Court of Appeals remanded the action to the District Court for class action deter-mination, and for further proceedings to determine the issue of whether the enforcement procedure under the Uniform Commercial Code satisfies the due process. (Majority opinion, A. 159a-168a; dis-senting opinion, A. 187a-191a.)

THE ARGUMENT.

POINT I

NEITHER THE WAREHOUSEMEN'S LIEN (§7-209, N.Y. UNIFORM COMMERCIAL CODE) NOR ITS ENFORCEMENT (§7-210, SUPRA) CONSTITUTES STATE ACTION.

The sine qua non for the maintenance of the subject action is a significant involvement of the State to the extent that the warehousemen's enforcement, actual or threatened, "[might] be fairly treated as that of the State itself." Jackson v. Metropolitan Edison, 419 U.S. 345, 351. To the same effect: Moose Lodge v. Irvis, 407 U.S. 163, Reitman v. Mulkey, 387 U.S. 369, Burton v. Wilmington Parking Authority, 365 U.S. 715.

The tests for determination of the requisite, significant State action or involvement were well articulated in Jackson v. Statler, 496 F.2d 623 (2nd Cir.) cert. den. 420 U.S.927, i.e.,

> "(1) The degree to which the 'private' organization is dependent on governmental aid; (2) the extent and intrusiveness of the governmental regulatory scheme; (3) whether that scheme connotes government approval of the activity or whether the assistance is merely provided to all without such connotation; (4) the extent to which the organization serves a public function or acts as a surrogate for the state; (5) whether the organization has legitimate claims to recognition as a 'private' organization in associational or other constitutional terms. Each of these factors is material, no one factor is conclusive."

The case herein meets none of the enumerated tests.

The bailment relationship that springs up upon the basis of the storage of goods in a public warehouse is a private, contractual relationship. There are no involvements with any governmental agencies or officials, regulatory or otherwise, nor do the allegedly offending sections delegate any power to any such agencies or officials. Moreover, as stated by the dissenting Judge in the Court of Appeals decision below, "Here we are not confronted with offensive discriminatory conduct by a private entity. There is nothing mandatory about the challenged statute; the State is neutral. The facts of the present controversy fail to establish involvement by the State of New York sufficient to constitute State action." (A. 190 a.) More specifically, the warehousemen's lien enforcement procedure does not fall within the purview of the category of actions that are normally performed by a public official.

In the enforcement procedure, there is no need for the intercession of any public official such as, for example, a sheriff, as would be the case in instances where there is the necessity as the first step in an enforcement procedure to seize goods or property in order to satisfy a claim arising from an issue not related to the rem. James v. Pinnex, 495 F.2d 206.

Neither the enactment of §7-210, New York Uniform Commercial Code, nor of its predecessor statute, §118, General Business Law, conferred upon public warehousemen any powers or functions which are essentially governmental.

All lien enforcement procedures are not necessarily govermental functions. The enforcement of a lien arising from possession is not traditionally a function of the sheriff. His office is normally called into play, only where there is a need to seize property in order to achieve the remedy. Shirley v. State National Bank, 493 Fed. 2nd 739, cert. den. 419 U.S. 1009; James v. Pinnex, Supra.

The conclusion of the District Court that there was a failure to show sufficient State involvement in the enforcement of warehousemen's liens to confer jurisdiction upon a Federal Court is sound, and comports with the weight of authority. Bond v. Dentzer, 494 Fed.

2nd 302, cert. den., 419 U.S. 837, Shirley v. State National Bank, Supra.

POINT II

THE PROCEDURAL SECTION OF THE UNIFORM COMMERCIAL CODE, 7-210 (2) AUTHORIZING ENFORCEMENT OF THE WAREHOUSEMEN'S LIEN BY SALE IS A REAFFIRMATION OF AN ANCIENT STATUTORY RIGHT. AS SUCH, THIS SECTION SHOULD BE AFFORDED THE SAME WEIGHT AND TREATED AND REGARDED IN THE SAME LIGHT AS A RIGHT FOUNDED UPON ORTHODOX COMMON LAW ANTECEDENTS.

The Court of Appeals opinion points out at A. 174a and 175a that by enacting U.C.C. §7-210, New York expanded the warehouseman's remedies "far beyond those existing at common law." Thus, the implication is clear that if the common law conferred upon the warehouseman both the possessory lien and the right to sell in order to achieve a satisfaction of the lien, State action might not be involved, and the subject action would therefore fail. It is, however, significant that §7-210 (2) was not an innovation of the Uniform Commercial Code; it was virtually a reenactment of a statute in effect since 1879 (A. 175a, note 14). It is, accordingly, submitted, that where, as here, a principle is the offspring of an ancient legislative enactment that

came into being after the adoption of the Fourteenth Amendment (A. 175a, note 13), it deserves to be afforded great weight. For nearly 100 years, enforcements in accordance with the defined rules and safeguards of the statute and an "accretion of safeguards" has been achieved without any significant State involvement. Bond v. Dentzer, 494 Fed. 2nd 302, cert. den. 419 U.S. 837; Shirley v. State National Bank, Supra.

POINT III

THE ISSUE AT BAR RELATES TO THE ENFORCEABILITY OF THE POSSESSORY LIEN BASED PURELY UPON STATUTORY AUTHORIZATION THEREFOR. THE ISSUE HAS NO RELEVANCE TO ENFORCEMENTS BY SALE PURSUANT TO CONTRACTS.

The right to enforce the possessory lien is not wholly dependent upon the grant of statutory authority; this right may be grounded on contract and, indeed, as pointed out below by the petitioner Flagg, it is the custom in the public warehouse industry to provide by contract for the lien and sale of the goods to enforce payment (A. 113a). Thus, the decision by this Court on the question presented should have no bearing upon the right to achieve an enforcement based upon contract between bailor and bailee. There is, patently, nothing governmental about such an enforcement. It is based upon and con-

stitutes a purely private transaction in which the State plays no role whatsoever.

CONCLUSION.

No significant State involvement is present or demonstrable when a warehouseman exercises a non-judicial sale to enforce his lien. The decision of the District Court in dismissing the complaint was proper and it merits approval and reinstatement.

Respectfully submitted,

Arnold H. Shaw
Attorney for Respondents (in support of the Petitioners), Warehousemen's Association of New York and New Jersey, Inc. and The Cold Storage Warehousemen's Association of the Port of New York

Jaffe, Shaw & Rosenberg
51 Madison Avenue
New York, N.Y. 10010
(212) 683-0275

Of Counsel